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No. 05-390

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In The
Supreme Court of the United States

THERON M. McCLAIN,

Petitioner,

v.

RETAIL FOOD EMPLOYERS JOINT PENSION PLAN AND BOARD OF TRUSTEES OF RETAIL FOOD EMPLOYERS JOINT PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

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A. STATEMENT OF THE CASE

Congress Did And Intended To Treat Service Differently For Accrual And Vesting Purposes

Respondents rely on ERISA Section 203(b)(1)(F), 29 USC § 1053(b)(1)(F), which allows a plan to disregard *for vesting purposes* "(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date." ERISA's minimum accrual and vesting provisions, however, are *not* interchangeable: the former govern service used to compute the amount of the "accrued benefit," while the latter determines "the nonforfeitable percentage" of the accrued benefit. Indeed, a review of ERISA's vesting and accrual provisions compels the conclusion that Congress not only did, but intended to treat service differently for vesting than for accrual purposes.

For *accrual* purposes, the only service taken into account is service rendered since participation began, so that creditable service is based on an employee's "years of participation" in the plan. Section 204(b)(4), 29 USC § 1054(b)(4), and 29 CFR § 2530.210(a)(2) ("Section 204(b) of the Act and 411(b) of the Code require only that periods of actual participation in the plan (e.g., covered service) be taken into account for purposes of benefit accrual").

By contrast, for *vesting* purposes the number of years of participation is irrelevant. In fact, *vesting* is based on "years of service," Section 203(a)(2), 29 USC 1053(a)(2), and Section 203(b)(1), 29 USC § 1053(b)(1), requires that "all of an employee's years of service with the employer or employer maintaining the plan shall be taken into account," with certain exceptions, *regardless of when*

participation began. See also 29 CFR § 2530.210(a)(1). Similarly, for vesting purposes, but not for accrual purposes, both "covered service" and "contiguous noncovered service" with an employer or employers maintaining the plan "shall be taken into account." 29 CFR § 2530.210(c)(1).

Furthermore, a "year of service" for *vesting* purposes is defined, in pertinent part, as 1,000 hours of service. Section 203(b)(2)(A), 29 USC § 1053(b)(2)(A). A "year of participation" for *accrual* purposes, on the other hand, is not defined, by ERISA, but must be set by the plan sponsor, based on "customary" full-time employment, with the proviso that a partial year of participation must be prorated for accrual purposes. If an employee's service, however, amounts to less than 1,000 hours in a plan year, it can be disregarded. ERISA Sections 204(b)(4)(B), (C), (D) and (E), 29 USC § 1054(b)(4)(B), (C), (D), and (E).

Finally, ERISA as effective in 1976 permitted a plan to deny participation (and, therefore, service credit for accrual purposes) to employees younger than age 25 and, under certain circumstances, age 30. ERISA Sections 202(a)(1)(A)(i) (1976) and 202(a)(1)(B)(ii) (1976), 29 USC §§ 1052(a)(1)(A)(i) (1976) and 1052(a)(1)(B)(ii) (1976), respectively. By contrast, for vesting purposes, ERISA Section 203(b)(1)(A) (1976), 29 USC § 1053(b)(1)(A) (1976), permitted plans to disregard only years of service before age 22, but under certain circumstances, required that *all* years of service, without regard to age, be credited for vesting purposes.[1]

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[1] Section 203(b)(1)(A) (1976), 29 USC § 1053(b)(1)(A) (1976), permitted a plan to disregard for vesting purposes only service before age 22. It also contained a special provision for a plan whose vesting

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In sum, it is undeniable that Congress not only treated service for accrual purposes differently from service for vesting purposes, but intended to do so. Indeed, had Congress intended to treat them the same way, it would have used the same terms for both (rather than "years of participation" for accrual and "years of service" for vesting), would have credited service equally for accrual and vesting, and would have cross-referenced Section 204(b)(4) to Section 203(b)(1), rather than to Section 202(b).

There is no principled way to engraft into the "period of service" used for accrual purposes the exception contained in subsection (F) of Section 203(b)(1) (service disregarded under the terms of the pre-ERISA plan), without also engrafting all the other exceptions contained in that Section. Yet, some of those exceptions, e.g., those relating to age and service, are incompatible with one another.

The different treatment of pre-ERISA breaks-in-service for accrual and vesting purposes has been noted by learned commentators. *See* Stephen R. Bruce, *Pension Claims: Rights and Obligations*, BNA, 2d Ed 1993, p. 147.

> In counting years of service for vesting, ERISA expressly permits pre-ERISA break-in-service rules to continue in force if the break in service occurred under a plan's terms before [ERISA's effective date]. However, no similar exception is

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provisions did not comply with either the 10-year cliff vesting schedule or the 15-year gradual vesting schedule, but only with the rule-of-45 (50% vesting when the sum of age and service equals 45%, 100% when it adds up to 55). Such a plan could not disregard years of service before age 22, if the employee was a plan participant.

> made in the rules for counting years of participation for benefit accruals. Rather, ERISA Section 204(b)(4)(A) [formerly 204(b)(3)(A)] provides that years of participation must include all years that are required to count under ERISA Section 202(b). This section in turn only permits a plan to disregard those years of service that may be canceled under the ERISA rule of parity.

Engrafting some of the rules governing vesting into the accrual rules would be analogous to the "'blue pencil' method of statutory interpretation," which "omit[s] all words not part of the clauses deemed pertinent to the task at hand [and] impermissibly ignores the relevant context in which statutory language subsists." *Massachusetts Mut Life v Russell*, 473 US 134, 142, 87 LEd2d 96, 105 SCt 3085 (1985).

Respondents argue that a regulation issued by the U.S. Department of Labor, 29 CFR § 2530.204-2(b), "is persuasive" in demonstrating that the period of pre-ERISA plan participation creditable for accrual purposes is governed by the terms of the pre-ERISA plan. According to Respondents, "[t]his regulation provides that 'all service from the date of participation in the plan *as determined in accordance with applicable plan provisions, shall be taken into account in determining an employee's period of service.*'" At 3 (italics in the original). In fact, that Regulation, as its title indicates ("Accrual computation period"), does not govern the pre-ERISA service that must be credited. Rather, it governs the 12-consecutive month period to be used in crediting pre-ERISA service.

The Regulation that governs what service must be credited is 29 CFR § 2530.204-1 ("Year of participation for benefit accrual") and, quite significantly, contains no

special provision for pre-ERISA service. Instead, it tracks the provisions of ERISA Section 204(b)(4), providing at 29 CFR § 2530.204-1(b)(1) in pertinent part: "In calculating an employee's period of service for purposes of benefit accrual under a defined benefit pension plan, section 204(b)(3) of the Act and section 411(b)(3) of the Code permit the following service to be disregarded: service before an employee *first becomes a participant in the plan* . . . " (Emphasis added)

The reference to "first" becoming a participant in the plan is an interpretation of ERISA Section 204(b)(4) (formerly 204(b)(3)), which requires the crediting of service commencing with "the earliest date on which the employee is a participant in the plan." The words "first" and "earliest" indicate that a participant may have several commencement of participation dates, each one following a break in service, but that only the "first" and "earliest" is taken into account for accrual purposes. The Second Circuit in *McDonald v NYSA-ILA Pension Plan*, noted as much: "This combination of "the earliest date" and "all years of service"[2] on its face does not allow for any break in a participating employee's service to negate previously accrued benefits," except for the "rule of parity" 320 F3d 151, 157, note 4 (2d Cir 2003).[3]

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[2] As noted in *McDonald*, Section 202(b)(1) *requires* the crediting of "all years of service with the employer or employers maintaining the plan." 320 F3d at 157.

[3] Even assuming, *arguendo*, that there was any ambiguity in 29 CFR § 2530.204-1(b)(1), enforcement and interpretation of ERISA's minimum standards, including minimum vesting and accrual standards, were transferred to the Secretary of the Treasury by the ERISA Reorganization Plan No. 4 of 1978. In response to the District Court's request, the Office of Chief Counsel of the Internal Revenue Service

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B. REASONS FOR GRANTING THE WRIT

According to Respondents, "the suggestion that countless numbers are affected by the issue presented herein is supposition at best. In fact, common sense might lead to the opposite conclusion given the unlikely sequence of events that led to this case . . . " At 5. It is true, of course, as stated by Voltaire with tongue firmly planted in cheek, that "common sense" appears to be the best-distributed of virtues, because no one complains of a lack of it. "Common sense," however, leads here to the opposite of the conclusion advocated by Respondents.

Respondents conclude that the only evidence as to the numbers of individuals who might be affected by a pre-ERISA break in service rule are the plaintiffs in the four cases cited in the Petition, "hardly a large number given the fact that ERISA has now been in place for three decades." At 4-5. In fact, however, Respondents themselves in their Brief before the Seventh Circuit relied on a number of additional decisions on the issue presented in this Petition, namely, *Tanzillo v Local Union 617*, 769 F2d 140 (3rd Cir 1985); *Haas and Cass v The Boeing Co*, 1992 US Dist LEXIS 13240 (ED Pa 1992), *aff'd without opinion*,

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confirmed that all pre-ERISA years of service should be taken into account for accrual purposes, unless lost due to ERISA's "rule of parity." (App 49) While IRS opinion letters are not entitled to *Chevron* deference, they are "entitled to respect," albeit "only to the extent that they have the power to persuade." Indeed, "[f]or a court to attempt to answer these questions [regarding ERISA's minimum accrual standards] without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" *Mead Corp v Tilley*, 490 US 714, 726, 109 SCt 2156, 104 LEd2d 796 (1989), quoting from *Ford Motor Credit Co v Milhollin*, 444 US 555, 568, 100 SCt 790, 798, 63 LEd2d 22 (1980).

993 F2d 877 (3rd Cir 1993); *Childs v Laborers' District Council Constr Industry Pension Fund*, 2003 US Dist LEXIS 15675 (ED Pa 2003); *Jameson v Bethlehem Steel Corp*, 634 FSupp 688 (ED Pa 1986); and *Redmond v Burlington Northern RR Pension Plan*, 821 F2d 461 (8th Cir 1987). These five decisions are in addition to *Jones v UOP*, 16 F3d 141 (7th Cir 1994); *McClain v Retail Food Employers Joint Pension Plan*, 413 F3d 582 (7th Cir 2005); *McDonald v NYSA-ILA Pension Plan*, 320 F3d 151 (2d Cir 2003); *DiGiacomo v Teamsters Pension Trust Fund of Philadelphia and Vicinity*, 420 F3d 220 (3rd Cir 2005); *Hoover v Bank of America Corp*, 286 FSupp2d 1326 (MD Fla 2003), *aff'd*, 2005 US App LEXIS 8003 (11th Cir Jan 5, 2005). These ten decisions, some brought on a class basis and many quite recent, cannot but lead to a "common sense" conclusion that the issue presented for review occurs quite often, attest to its continued importance, and are more than sufficient to justify granting the Writ.

Furthermore, regardless of the number of officially and unofficially reported decisions, the fact remains that pension plans that cover participants in more than one federal Circuit should not be subject to conflicting interpretations of ERISA, and that the pension rights of participants working under the same plan should not depend on the law of the particular Circuit in which the action is brought or litigated.[4] Although Petitioner discussed and

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[4] For an example of [illegible]n a case where the issue arose in the context of a motion for a change of venue, *see Wausau Benefits v Liming*, ___ FSupp2d ___, 2005 WL 2333689 (WD Wis, Sept 23, 2005). In *Liming* the plaintiff, an insurance company, sought to enforce a subrogation agreement against a plan participant, and resisted a change of venue motion on the grounds that a change of venue would be outcome-determinative, because of the different approaches to subrogation by the

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